Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an "adequate state remedy" will categorically bar a tenured employee's action against a public school board under 42 U.S.C.A. § 1983 for a deprivation of property without due process of law in violation of the Fourteenth Amendment, where pretermination due process is feasible and state law gives the school board the exclusive power to provide due process, but the school board repeatedly refuses to effectuate due process either before or for 18 months after the termination.

2. Whether a state remedy limited to reinstatement with back pay, awarded 18 months after a state employee's termination, is adequate to protect the employee's right to procedural due process, where the employer has repeatedly refused to provide due process either before or after the termination.

3. Whether a state actor violates a tenured employee's substantive due process rights under the Fourteenth Amendment by terminating the employee, when a hearing has established that it has inadequate grounds for her termination.

PARTIES TO THE PROCEEDING

Petitioner, Adrienne Dowling, is an individual residing in Atlanta, Georgia. She was the Plaintiff in the lower court proceedings of this case and was the Respondent before the Supreme Court of Georgia.

Respondent, Atlanta City School District, is an independent state body created by the Constitution of the State of Georgia (1983). It was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

Respondents, Joseph G. Martin, Jr., Preston W. Williams, Midge Sweet, D. F. Glover, John F. Elger, Robert Waymer, Mary Anne Bellinger, Ina Evans, and Carolyn Yancey, are individuals who comprised the Atlanta Board of Education and were residents of Atlanta, Georgia. They were Defendants in the lower court proceedings and were Petitioners before the Supreme Court of Georgia.

Respondent Lester W. Butts, an individual, was the Superintendent of the Atlanta City School District. He was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

Respondent Myrtice Taylor, an individual, was the Associate Superintendent for Instruction of the Atlanta City School District. She was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

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OPINIONS BELOW

On February 12, 1996, the Supreme Court of Georgia issued its opinion, reversing the decision of the Georgia Court of Appeals and affirming the trial court's dismissal of the action. The official citation for the opinion below is *Atlanta City School District v. Dowling*, 266 Ga. 117 (1996).

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Supreme Court of Georgia and its judgment of February 12, 1996, affirming the dismissal of this action by the trial court, the Superior Court of Fulton County (Georgia). Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a). The Supreme Court of Georgia is the state's highest court.

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Synopsis.

In April, 1992, Respondent Atlanta Public School District announced its intention to fire Petitioner Dowling effective June 30. Dowling had tenure, and state law gave the School District the exclusive power and duty to provide her due process to her. On June 30, although it had not attempted to hold a hearing in the preceding two months, it fired her. She filed suit in state court, citing *inter alia* 42 U.S.C. § 1983, and the court ordered the School District to continue her salary until it held a fair hearing. An independent hearing body then heard the case and held that the School District had no cause to terminate Dowling.

A few days later, the School Board fired Dowling anyway, without reviewing the evidence presented at the hearing. It then refused to forward her administrative appeal to the State Board of Education. When the court forced the School District to forward the appeal, the State Board found the termination "arbitrary and capricious". The School Board still refused to reinstate her. Finally, 18 months after her termination, the court ordered Dowling's reinstatement with back pay.

The Supreme Court of Georgia held that Dowling's reinstatement with back pay was an "adequate state remedy" which categorically barred her from pursuing her action for damages and attorneys' fees under § 1983. In

its decision, it failed to discuss this Court's holding in *Zinermon v. Burch*, 494 U.S. 113 (1990), which held that an adequate state remedy would not bar an action under § 1983 if the deprivation without due process was accomplished by a state actor which was authorized under state law to effectuate the deprivation and was responsible, under state law, to provide due process.

In the Petition below Dowling argues: 1) The School Board's repeated refusals to effectuate procedural due process were an abuse of the power assigned to them by state law, and an adequate state remedy will thus not bar a suit under § 1983; 2) In any case, the state remedy was not adequate to protect her Constitutional rights; and 3) By firing Dowling after a hearing established that it had no right to fire her, the Atlanta Schools deprived Dowling of substantive due process.

B. Statement of the Case.

Petitioner, Mrs. Adrienne Dowling, was the general manager of Atlanta's public broadcast stations (WABE radio and WPBA television). Respondent, Atlanta City School District, holds the license for these stations and was therefore Dowling's employer. It granted her "tenure" in 1990; the court below held that Dowling's contract raised an expectation of continued employment under Georgia law sufficient to give her a property interest in her job. This holding was not appealed and is thus undisputed.

In 1991, the relationship between Dowling and the School Board soured. Dowling claimed this problem resulted from her refusal to allow members of the School

Board and their political cronies to line their pockets with station funds and otherwise abuse the stations for their personal benefit. Respondent Lester Butts, the Superintendent of the Atlanta City School District, alleged that these problems stemmed entirely from Dowling's performance deficiencies. (R II 8-9, 73-74)

In a letter dated April 13, 1992, Superintendent Butts proposed to terminate Dowling's employment effective June 30, 1992, and admitted she had a right to a hearing prior to termination. On June 30, however, the School District terminated Dowling's employment without giving her a hearing of any sort during the intervening two months. (R II 88-90, 101-02 (#20)) The initial hearing was first scheduled for July 15, 1992, before the Georgia Professional Practices Commission (hereinafter the "PPC").[1] The hearing was continued because the PPC (acting as the School District's agent) failed to provide a disinterested hearing officer.[2] (R II 90-91, 102-103 (## 20-24)) The School District did pay Dowling's salary from June 30 to July 15.

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[1] Under Georgia law, the members of a board of education themselves have the power and duty to constitute the tribunal in a case such as this one. The Atlanta Board requested that the PPC hear the case in their stead, which suited Dowling and is thus not at issue.

[2] The Respondents apparently contest Dowling's attribution of this failure to them. This is a question of disputed fact which must be resolved in Dowling's favor at this point, i.e. in resolving a motion to dismiss. At any rate, the hearing was constitutionally inadequate and would have been continued anyway; a later hearing officer found that the notice given to Dowling was inadequate to allow her to make a defense, and continued the procedure a second time.

On August 4, 1992, the School District informed Dowling that she had no right to any due process at all; while it might proceed with a hearing rescheduled in September, it would not consider itself bound by the result. (R II 137) Dowling then filed suit in the Superior Court of Fulton County, seeking to require the School District to reinstate her and to grant her due process prior to terminating her.

On August 19, the superior court issued an order finding that Dowling had a property interest in her employment and restraining the Atlanta Schools from discontinuing Dowling's salary until they had complied with the due process specified in the contract. (R I 63) The court, however, refused to reinstate her pending a hearing and decision.

The due process hearing was recommenced on September 14. The new hearing officer, however, once again continued the hearing, finding that the School District had not given Dowling sufficient notice of the charges against her. (R II 147-54) The hearing was finally held before a three-person PPC tribunal on October 4, 5, and 8, 1992. On October 27, the PPC tribunal held, unanimously, that the School District did not have sufficient cause to fire Dowling.

On November 9, 1992, the School Board voted to fire Dowling, despite the PPC's decision that it did not have grounds to do so. No member of the School Board had attended the hearing. In fact, the Board had not even had a full transcript of the hearing prepared and could not have reviewed the evidence independently. (R I 194, 229-30)

On November 20, Dowling filed an appeal to the State Board of Education with Superintendent Butts, as provided by her contract and state administrative procedures. (R II 188) Butts then had the ministerial obligation, under Georgia law, to forward the appeal to the State Board. (R I 157, 193) Butts, however, refused to transmit the appeal. Dowling returned to court. On her motion, the superior court held Butts and the School District in contempt of its restraining order for refusing to transmit the appeal, but again refused to reinstate Dowling until the administrative process was complete.[3] (R I 292) Butts then transmitted the appeal to the State Board, four months late.

On July 8, 1993, the State Board of Education considered Dowling's appeal and held in her favor, finding that the discharge was "arbitrary and capricious". (R II 218) Nevertheless, the School District continued its refusal to return Dowling to work, or to pay her salary. The superior court, although granting Dowling summary judgment on the issue of liability, declined to compel Dowling's reinstatement. (A14-A17.) Dowling then had to bring further motions in court, including an evidentiary hearing, before the Defendants would reinstate her (January 3, 1994) or pay her back pay (January 27, 1994). (R II 238, 276, 284, 390)

Dowling, whose original complaint had pleaded a cause of action under 42 U.S.C. § 1983, attempted to bring

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[3] The School District appealed the contempt order to the Supreme Court of Georgia, which affirmed it. *Atlanta City School District v. Dowling*, Georgia Supreme Court Case No. S93A1330 (November 4, 1993). (R II 3)

the case to trial before the superior court, seeking damages and attorneys' fees for the School District's repeated and malicious refusals to afford her procedural due process over the previous one and one-half years. On April 1, 1994, the superior court dismissed the complaint, holding that Dowling's eventual reinstatement with back pay constituted an "adequate state remedy" which fully compensated her for the Constitutional deprivation of due process. (A12-A13.)

As of that time, Dowling's attorneys' fees had run to roughly $107,000. On July 11, 1994, the trial court awarded Dowling about $28,000, the amount compensable under state law for abusive litigation (O.C.G.A. § 9-15-14) but less than Dowling was due under 42 U.S.C. § 1988 (contested fact). (Supplemental Record.)

Many of the facts stated herein are apparently disputed by the Respondents, particularly the questions of whether they provided Dowling with a foreshortened hearing prior to her first (June 30) termination and whether the failure to provide early hearings were their fault or Dowling's. The case comes before this Court, however, on the superior court's grant of the Respondents' motion to dismiss, and was decided as a question of law. Under these circumstances, both federal and Georgia practice dictate that the plaintiff's allegations of fact will be taken as true. *E.g., Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974); *Frady v. Irvin*, 245 Ga. 307, 176 S.E.2d 866 (1980). Moreover, the facts underlying the later violations of due process are uncontested, such as the School District's refusal to implement the PPC decision in Dowling's favor and the illegality of its refusal to transmit her appeal to the State Board of Education.

Statement Pursuant to Supreme Court Rule 14(1)(g)(i)

The Constitutional question was initially raised in the original Complaint to the Superior Court of Fulton County (August 18, 1992), ¶ 31:

> The Schools' dismissal of Dowling without a hearing violates U.S.C.A. §§ 1983 and the fourteenth amendment of the Constitution of the United States.

The Fulton County Superior Court considered and dismissed this count of the Complaint in its Final Order of April 1, 1994. (A13.) Dowling appealed the dismissal, on the grounds that it violated the Fourteenth Amendment, to the Georgia Court of Appeals, which, acting as a Whole Court (i.e. en banc) found in her favor and reversed by order dated March 16, 1995. (A6-A11.) The Supreme Court of Georgia considered the Constitutional issue and reversed the Court of Appeals, reinstating the Superior Court's dismissal, in the Order of February 12, 1996. (A1-A5.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW, HOLDING THAT THE EXISTENCE OF AN ADEQUATE STATE REMEDY CATEGORICALLY BARS AN ACTION UNDER § 1983, DIRECTLY CONTRADICTS A PRIOR DECISION OF THIS COURT.

In *Parratt v. Taylor*, 451 U.S. 527 (1981) (as modified in *Daniels v. Williams*, 474 U.S. 327 (1986)), and *Hudson v. Palmer*, 468 U.S. 517, 531-32 (1984), this Court carved out

an exception to the general rule that a state employer is liable under § 1983 for failing to provide a hearing prior to depriving a person of property. If the state's action is negligent, or is a "random, unauthorized" act performed by a lower-level employee, it is not possible for the state to provide a predeprivation hearing. It "borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct." *Parratt*, 451 U.S. at 541.

In 1990, this Court generally limited the exceptions stated in *Parratt* and *Hudson*:

> [Parratt and Hudson] do not stand for the proposition that in every case where a deprivation is caused by an 'unauthorized' departure from established practices, State officials can escape § 1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Matthews*.

Zinermon v. Burch, 494 U.S. 113, 138 n.20 (1990).

In the decision below, the Georgia Supreme Court completely failed to address the underlying rationale of this Court's decisions in *Parratt* and *Hudson*. Finding that Dowling had been reinstated with back pay, it held that she was catergorically barred from bringing an action under § 1983: "We hold that the state provided a constitutionally adequate remedy that bars Dowling from maintaining her damages action under section 1983." (A1.) In so holding, it directly contradicted the express holding of this Court in *Zinermon v. Burch*:

> In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes. . . . Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. . . . [I]n many cases there is 'no quarrel with the state laws on the books'; instead, the problem is the way those laws are or are not implemented by state officials.
>
> * * *
>
> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.

Zinermon, 494 U.S. at 124-25 (internal citations omitted), 132. Here, there is no question that predeprivation due process was feasible, since the School District proposed the termination in April and did not effectuate it until June 30, over two months later.

This Court's holding in *Zinermon v. Burch, supra*, applied two main factors in determining a state official's authority to commit a deprivation of procedural due process:

> [P]etitioners cannot characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to

> initiate the procedural safeguards set up by state law to guard against unlawful confinement. . . .

494 U.S. at 138.

The Atlanta School District meets both factors. As to the first factor – delegation of authority to commit the deprivation – the Atlanta School District is a creature of the Georgia Constitution and is not subordinate to any other state body. An elected Board of Education has "complete control and management" of the schools within its jurisdiction, including the right to fire employees. Constitution of the State of Georgia, Article 8, § 5; *Patterson v. Boyd*, 211 Ga. 679 (1955).

As to the second factor – a "delegated . . . concomitant duty to initiate the safeguards set up by state law" – Georgia statutes give the Atlanta School District exclusive power and responsibility to provide adequate due process, both in the case of a tenured teacher's discharge, O.C.G.A. § 20-2-940, 942, and in the case of a tenured employee otherwise unprotected, O.C.G.A. § 20-2-1160.[4]

In the case of a hearing held under O.C.G.A. § 20-2-1160, such as Dowling's, the state does not even prescribe the type of notice to be given, the time within which the hearing shall be held, the persons before whom it is to be held, or any other guarantees of fairness. The School Board may use whatever procedure it invents, and

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[4] O.C.G.A. § 20-2-1160 was ultimately held to be the jurisdictional statute underlying Dowling's administrative procedure.

the State Board of Education has held that it is without power to reverse a decision because of procedural unfairness. (R II 228-231) Also, the School District (acting through its Superintendent) has the exclusive power and duty to forward an appeal of its decision to the State Board of Education. Its power and duty is exemplified by the facts of this case. When the School District refused to forward Dowling's appeal, no superior executive power could order it to do so; her only remedy was judicial.

One could not create a case in which a state actor's deprivation of due process was more "authorized" than this. The Atlanta School Board terminated Dowling by an official vote, under the power granted to it by statute, and without providing the due process that state law gave it the exclusive power to provide.

II.

THE DECISIONS OF STATE COURTS AND CIRCUIT COURTS OF APPEALS CONFLICT ON THE ISSUE OF WHETHER AN ADEQUATE STATE REMEDY, IN AND OF ITSELF, IS SUFFICIENT TO BAR A SUIT UNDER § 1983.

Roughly half of the state appellate courts which have considered the question have allowed a plaintiff to state a claim under § 1983 unless the deprivation of due process was "random and unauthorized", and predeprivation due process was "unfeasible", regardless of the availability of a state remedy. Typical of these cases is *Kellogg v. City of Gary*, 562 N.E.2d 685, 701 (Ind. 1990):

> Since there is nothing to suggest that a predeprivation hearing was clearly not feasible, the existence of an available state remedy does not

> preclude the citizens from pursuing a procedural due process claim under § 1983.

Other states which have adopted this approach, with or without such a clear statement of their holding, include: *Owens v. City of Phoenix*, 884 P.2d 1100, 1107 (Ariz. App. 1994) ("the adequacy of such a postdeprivation remedy is not a bar to a procedural due process claim where a predeprivation hearing is feasible and the deprivation is not a random, unauthorized act"); *Brosterhous v. State Bar of California*, 906 P.2d 1242, 1249 (Cal. 1995) ("the availability of a state remedy does not displace a section 1983 action"); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991) ("[t]he existence of an adequate state remedy was irrelevant" to a § 1983 claim where predeprivation due process is not "impossible or impracticable"); *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983) (allowing § 1983 suit on grounds of public policy). *Cf. Knight v. City of Missoula*, 827 P.2d 1270, 1274 (Mont. 1992) (negligence case); *Irby v. Macht*, 522 N.W.2d 9 (Wis. 1994); *Cooperman v. University Surgical Associates, Inc.*, 513 N.E.2d 288, 291, 298 (Ohio 1987) (defendants' actions not "within the scope of their . . . responsibilities"); *Wilhelm v. Gray*, 766 P.2d 1357, 1360 (Okl. 1988) (negligence case).

State cases which have gone the other way, like the present case, generally do not discuss the feasibility of a predeprivation hearing; rather, as in the present case, the opinions simply sidestep the issue. Typical of these cases is *Anselma Station Ltd. v. Pennoni Associates, Inc.*, 654 A.2d 608, 612 (Pa. Cmwlth. 1995), which states flatly that

> an individual is not denied predeprivation due process if a state provides means by which he can receive redress for the deprivation. A post-

> deprivation hearing is adequate to provide such redress.

See Roberts v. Joiner, 590 So.2d 195 (Ala. 1991) (termination by town council); *Dauchenhausen v. Croson*, 585 N.Y.S.2d 281, 286 (Sup. 1992); *Temple v. Marlborough Division of District Court*, 479 N.E.2d 137 (Mass. 1985); *City of Lake Worth v. Walton*, 462 So.2d 1137, 1140 (Fla. App. 4 Dist. 1984); *cf. Myers v. Adams*, 728 S.W.2d 771, 772 (Tex. 1987) (negligence case, but in dicta states that "assuming that the wrongful conduct" were intentional, the existence of adequate state remedies would foreclose a § 1983 claim); *Schroeder v. Morton Grove Police Pension Board*, 579 N.E.2d 997 (Ill.App. 1991) (dicta); *Lindenman v. Umscheid*, 875 P.2d 964, 976 (Kan. 1994).

The same split occurs among the various U.S. Courts of Appeals. The First, Second, and Seventh Circuits would have ruled for the Atlanta School District; the Sixth and Eighth, for Dowling.

The First Circuit Court of Appeals has repeatedly held that an adequate state law remedy will defeat a § 1983 claim, without examining the feasibility of predeprivation due process or whether the failure to provide predeprivation due process was "random or unauthorized":

> [g]iven an adequate state-law remedy for a procedural due process claim, no § 1983 claim lies.

Reid v. State of New Hampshire, 56 F.3d 332, 336 n.8 (CA1 1995). *See Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (CA1 1994); *Rumford Pharmacy v. City of East Providence*, 970 F.2d 996, 999 (CA1 1992) (failure to allege inadequacy of state remedies warrants dismissal of a § 1983 claim).

The Second and Seventh Circuits have adopted a test only slightly more lenient. In *Easter House v. Felder*, 910 F.2d 1387 (CA7 1990) (en banc), the Seventh Circuit stated that a § 1983 remedy would lie only where the state legislature had failed to provide an administrative procedure or where the state legislature knew that state officials were likely to disregard the procedure in place. In *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (CA7 1991), it again stated that § 1983 procedural due process cases would be limited to actions where the failure to provide a hearing was an "established state procedure." The Second Circuit has adopted a similar rule, albeit without the same degree of analysis. *E.g., Katz v. Klehammer*, 902 F.2d 204 (CA2 1990).

The Sixth Circuit and Eighth Circuits have reached the opposite conclusion. In *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (CA6 1992), the school board had provided an adequate pretermination hearing. 958 F.2d at 1349. Although state law provided for an administrative appeal, the school board obstructed the plaintiffs from obtaining their appeals. Under these circumstances, heeding this Court's holding in *Zinermon v. Burch*, the Circuit allowed a § 1983 claim to proceed, on the grounds that the local board had abused its power under state law to provide due process, even though state law provided for an administrative remedy. The Eighth Circuit has also allowed a § 1983 action, where procedural due process was denied by a local board of education. *Moore v. Warwick Public School District No. 29*, 794 F.2d 322 (CA8 1986).

III.

THE DECISION OF THE COURT BELOW, HOLDING THAT THE STATE REMEDY IS ADEQUATE TO PROTECT DOWLING'S CONSTITUTIONAL INTERESTS, DIRECTLY CONTRADICTS A PRIOR DECISION OF THIS COURT.

A. Georgia Does Not Provide a Tort Remedy.

This Court stated in *Zinermon v. Burch* that the exceptions to *Parratt* and *Hudson* would not apply to every case where the action was unauthorized *and* the state supplied a "tort remedy". 494 U.S. at 138, n.20 (1990). Here, the state has not supplied a tort remedy. The Georgia law of sovereign immunity precludes Dowling from seeking compensatory or punitive damages under state tort law.[5] O.C.G.A. § 20-2-992; *e.g., Truelove v. Wilson*, 159 Ga. App. 906 (1981).

The present case constitutes a good vehicle for giving the guidance on this important and recurring issue of law under the Due Process Clause. Dowling asserts that, in order to be "adequate", a state remedy must *at least* compensate the victim of an unconstitutional property deprivation with such compensatory damages as can be proven to a jury. Dowling's deprivation of due process

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[5] Where the adequacy of a state remedy does come into play, the concept of sovereign immunity has caused this Court great concern. While it has never decided the issue, it has hinted broadly that a state's application of sovereign immunity may render a state remedy for a procedural due process violation "inadequate". For example, in *Hudson*, this Court discussed the problem at length, but did not decide it because Virginia law probably would not apply sovereign immunity to Hudson's case. 468 U.S. at 535-36 and n.15.

for 18 months[6] caused her to suffer direct economic damage: she had to borrow money on her credit cards, at interest rates as high as 18% per annum, in order to pay her bills, and she had to pull her son out of college in Rhode Island.

In addition, she suffered considerable humiliation and physical distress as a result of her highly public firing for alleged incompetence. Finally, she incurred attorneys' fees which, for a woman at her economic level, are enormous.

B. The State of Georgia Did Not Supply Dowling with an Adequate Equitable Remedy.

Even if equitable relief of reinstatement with back pay *were* an "adequate state remedy" in some circumstances, the superior court did not reinstate Dowling pending the provision of due process. Rather, the superior court did not order Dowling's reinstatement until six months after the administrative process concluded in her favor. The end result was that the state, which at no time established a right to deprive Dowling of her employment, deprived her of her property interest for over 18 months. Such a "remedy" eviscerates the basic rule of due process: that a person has a right to due process *prior* to the deprivation, unless it is impossible or impracticable to provide it.

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[6] Dowling did receive two interim back pay awards, totally about seven or eight months of pay, in the early part of her case, pursuant to the TRO issued in August, 1992.

This Court has long held that there can be no right without a remedy. *E.g., Peck v. Jenness,* 48 U.S. (7 How.) 612, 623 (1849). This Court has also held that a tenured employee has a right to a due process before he is terminated. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Thus, because the decision below supplies no remedy for Dowling's temporary (18-month) deprivation of property – neither reinstating Dowling until a predeprivation hearing was held nor allowing her damages for the period of the deprivation – the decision below conflicts with the clear precedent of this Court. Georgia law refusing to enforce the requirement of predeprivation due process is well-established. *E.g., Turner v. Giles,* 264 Ga. 812 (1994) (deprivation of a blind vendor's license).

C. The State of Georgia's Statutes Do Not Require a School Board to Provide Due Process to All Tenured Employees.

Finally, the administrative procedures provided by the State of Georgia are inadequate to ensure due process. Although state law arguably ensures adequate due process to certificated teachers (O.C.G.A. § 20-2-940) and civil service employees (*Narey v. Dean,* 32 F.3d 1521, 1527-28 (CA11 1994)), Dowling was unprotected by either statute. The statute compelling the School District to provide her with due process is O.C.G.A. § 20-2-1160, which

gives unlimited discretion to a local school board in determining what procedure to follow.[7]

State law did not ensure that Dowling received fair hearing. The State Board of Education found that the notice given to Dowling was not specific enough to allow her "fairly to show any error that existed therein", but that, under O.C.G.A. § 20-2-1160, "the Local Board is not required to give [Dowling] *any* notice." (R II 228-30, emphasis added.)

In point of fact, the relief provided to Dowling by the superior court was grounded in the Fourteenth Amendment and § 1983, because the Georgia statute did not apply to her:

> 5.
>
> This Court agrees with the State Board's conclusion that the Plaintiff is not entitled to the protections of the Fair Dismissal Act as a matter of statutory construction. However, 'where no formal system of tenure exists, due process may be mandated nonetheless where state rules or understandings between the parties support a claim of entitlement to continued employment.' *LaPier v. Holliman*, 514 F.Supp. 692 (N.D. Ga., 1980).

(A16.)[8]

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[7] Dowling had due process rights under her employment contract in excess of those supplied by statute, as the contract adopted the procedures of the Fair Dismissal Act.

[8] *LaPier v. Holliman*, although construing state law to determine whether or not the plaintiff had a reasonable expectation of continued employment, did so in the setting of

Although Dowling won her hearing, she still suffered compensable injury from Georgia's facially inadequate procedure, to-wit: 1) a continuation of the hearing date, lengthening her termination by six weeks, and 2) the costs and attorneys' fees generated in attempting to ensure that the hearing was fair under 42 U.S.C. § 1988, which the court refused to award her.

There could be no greater proof of the inadequacy of Georgia's administrative remedies than the court's need to rely on the Fourteenth Amendment as the source of Dowling's procedural due process rights.

IV.

THE ATLANTA SCHOOL DISTRICT'S TERMINATION OF DOWLING, AFTER A HEARING HAD ESTABLISHED THAT IT DID NOT HAVE SUFFICIENT CAUSE, VIOLATED DOWLING'S RIGHT TO SUBSTANTIVE DUE PROCESS.

The Fourteenth Amendment prohibits termination of a tenured employee except for cause. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Roane v. Callisburg Independent School District*, 511 F.2d 633 (CA5 1975). The tendency in recent circuit court decisions has been to limit employee rights under the Fourteenth Amendment to procedural due process rights, on grounds that employment is not a fundamental right. *E.g., McKinney v. Pate*, 20 F.3d 1550 (CA11 1994) (en banc).

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the Fifth and Fourteenth Amendments, specifically citing *Board of Regents v. Roth*, 408 U.S. 564 (1972). 514 F.Supp. at 693-94.

At the time the Atlanta School Board voted to terminate Dowling, the PPC had already issued a report finding inadequate cause for discharge. The School Board then refused to reinstate her (or continue her salary) when the State Board of Education held her discharge to be "arbitrary and capricious", and then again when the superior court granted her summary judgment. In short, Dowling's right to her job was already established when the Atlanta School District fired her.

The main thrust of this petition is the Atlanta School District's violation of Dowling's procedural due process rights. As an alternative ground, however, she asserts that, at some point, a termination will violate substantive due process,[9] and asks the Court to consider the question if this petition is granted.

CONCLUSION

As of today, the protection a person receives from a taking of property without due process of law depends upon where he lives. In some state court systems and at least three federal circuits, a person deprived of property without due process cannot bring suit to enforce his rights if state law forbids the deprivation and provides some sort of relief. In some such jurisdictions – certainly in Georgia – the right to predeprivation due process is illusory. The Georgia courts will neither reinstate an

[9] Dowling presented the issue to the Supreme Court of Georgia, which neither discussed it nor ruled upon it.

employee to her job pending provision of due process, nor allow her damages for the term of the deprivation.

In other state courts and at least two federal circuits, the person deprived can avail himself of the protections of § 1983, as long as predeprivation due process was feasible and the responsible state body knew of the deprivation in advance (or was itself responsible for the breach, as in the present case).

Dowling urges this Honorable Court to grant her petition, in order to bring uniformity in enforcement of the Fourteenth Amendment throughout the nation and to ensure that the nations' courts apply this Court's previous decisions correctly.

Respectfully submitted,

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APPENDIX

In the Supreme Court of Georgia

Decided: FEB 12 1996

S95G1083. ATLANTA CITY SCHOOL DISTRICT et al. v. DOWLING.

FLETCHER, Presiding Justice.

The Atlanta Board of Education terminated Adrienne Dowling's contract as general manager of the school board's public television and radio stations. She sued and the trial court ordered the school board to reinstate her and awarded her full back pay and benefits. The trial court then granted the school board's motion to dismiss Dowling's claim for compensatory and punitive damages under 42 U.S.C. § 1983. The question on appeal is whether Dowling has a claim for damages for a procedural due process violation when she was reinstated in her job with back pay as a result of state remedies. We hold that the state provided a constitutionally adequate remedy that bars Dowling from maintaining her damages action under section 1983.

The Atlanta school superintendent notified Dowling in April 1992 that he would not recommend the renewal of her contract for the 1992-93 school year. In response to Dowling's request for a hearing prior to June 30 when her contract expired, the Atlanta board referred the matter to the Professional Practices Commission of Georgia. On June 30, 1992, Dowling's immediate supervisor instructed Dowling to vacate her office. In August, Dowling filed a lawsuit in state court alleging that the school board had terminated her without due process as provided under the Georgia Fair Dismissal Act, school board policies, and

Georgia and United States Constitutions. In October 1992, the Professional Practices Commission held a three-day hearing and found that the school superintendent did not meet his burden of proof in establishing the charges against Dowling. The Atlanta school board rejected the commission's recommendation and voted not to renew Dowling's contract. Dowling appealed to the State Board of Education, which reversed the Atlanta board's decision to terminate.

Having succeeded in the administrative process, Dowling moved for summary judgment on her due process claims in superior court. The trial court found that the Atlanta board had given Dowling a right to protection under the Fair Dismissal Act, granted Dowling summary judgment on the issue of liability under that act, ordered the Atlanta board to reinstate her as general manager, and awarded her back pay and benefits. Based on these orders, the trial court dismissed Dowling's claim for damages under 42 USC § 1983 for failure to state a claim. The Court of Appeals reversed,[1] and we granted certiorari.

Both the Georgia and Federal Constitutions prohibit the state from depriving "any person of life, liberty, or property, without due process of law."[2] A person may bring suit under 42 U.S.C. § 1983 for state officials' violation of procedural due process. Unlike a substantive due process claim, a constitutional violation of procedural

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[1] *Dowling v. Atlanta City School District*, 216 Ga. App. 688 (455 SE2d 399) (1995).

[2] U.S. Const. amend. 14; Ga. Const. Art. I, Sec. I, Para. I.

due process is not complete "unless and until the State fails to provide due process."[3] As the Eleventh Circuit Court of Appeals explained: "In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise."[4]

We conclude that the Eleventh Circuit's decision in *McKinney v. Pate* is persuasive authority that Dowling is not entitled to maintain a damages claim under section 1983 for a procedural due process violation. In *McKinney*, the court held that there was no due process violation and, therefore, no section 1983 claim when an public employee alleged that he was deprived of his property interest in employment by a biased decision maker at his pre-termination hearing.

> [E]ven if McKinney suffered a procedural *deprivation* at the hands of a biased Board at his termination hearing, he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation.[5]

The court concluded that the state provided an available, adequate remedy to address the due process violation through state court review of employment termination

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[3] *Zinermon v. Burch*, 494 U. S. 111 (110 SC 975, 983, 108 LE2d 100) (1990).

[4] *McKinney v. Pate*, 20 F3d 1550, 1557 (11th Cir.), cert. denied, (115 SC 898 130 LE2d 783) (1994).

[5] Id. at 1563.

cases, including the power to order the relief that McKinney sought. In a later case involving a state employee in this state, the federal appeals court found that the Georgia Code provides Georgia courts with the similar power to review employment termination cases for due process violations.[6]

Applying these cases, we hold that Dowling may not maintain a claim for damages for a procedural due process deprivation under section 1983 when the state court review of her termination provided an adequate remedy under state law. Before Dowling was terminated, the Atlanta school board notified her of the charges against her and referred her proposed dismissal to an impartial decision maker for a hearing. When the Atlanta board stopped paying her salary, the trial court issued a temporary restraining order requiring the school board to continue to pay her salary until it held a pre-termination hearing and rendered a final decision. Dowling received a full evidentiary hearing before the Professional Practices Commission, which recommended that the school board vacate the superintendent's decision not to renew Dowling's contract. When the Atlanta board rejected that recommendation and voted to uphold Dowling's dismissal, the trial court again ordered the board to continue to pay Dowling's salary pending her administrative appeal and this court affirmed that order on appeal.[7] On administrative review, the State Board of Education reversed the Atlanta board's decision to dismiss Dowling. Finally, the

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[6] See *Narey v. Dean*, 32 F3d 1521 (11th Cir. 1994).

[7] *Atlanta City School District v. Dowling*, 263 Ga. XXVI (1993) (judgment affirmed without opinion).

trial court granted the equitable relief that Dowling sought; it ordered the Atlanta school board to reinstate Dowling as general manager and awarded her full back pay and benefits.

All these actions were taken as a result of rights granted under either state statutes or local board policies. Because judicial review redressed any procedural due process deprivation that Dowling suffered, the trial court properly dismissed her section 1983 claim for damages for failure to state a claim.[8]

Judgment reversed. All the Justices concur.

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[8] See *Turner v. Giles,* 264 Ga. 812 (450 SE2d 421) (1994) (holding that blind vendor whose state license was terminated without a hearing had no viable section 1983 claim for damages for a procedural due process violation when he was reinstated and awarded back pay following a post-termination evidentiary hearing), cert. denied, (115 SC 1959) (1995); see also *Henderson v. Sherrington,* 189 Ga. App. 498 (376 SE2d 397) (1988) (holding that county employee had no section 1983 cause of action for damages for violation of her procedural due process rights when the available state remedy was adequate, resulting in reinstatement and back pay).

WHOLE COURT

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

March 16, 1995

In the Court of Appeals of Georgia

A94A2185. DOWLING v. ATLANTA CITY SCHOOL DISTRICT et al. P-147

POPE, Presiding Judge.

Plaintiff Dowling, an employee fired by defendants (collectively referred to herein as "the Board") without a pretermination hearing, brought this action pursuant to the Fair Dismissal Act of Georgia (OCGA § 20-2-940 et seq.) as well as the Fourteenth Amendment to the United States Constitution and 42 USCA §§ 1983 & 1988. Although the trial court ruled that plaintiff was not covered by the Fair Dismissal Act, it eventually found that the Board had improperly fired plaintiff without good cause and ordered the Board to reinstate plaintiff with full back pay. Citing *Henderson v. Sherrington*, 189 Ga. App. 498 (2) (376 SE2d 397) (1988), the trial court then dismissed plaintiff's claims for further damages and attorney fees under 42 USCA §§ 1983 & 1988 because reinstatement with back pay was an "adequate remedy." We conclude that *Henderson* was erroneously decided and should be overruled, and therefore reverse.

In April 1992, the Superintendent of the Atlanta Public Schools informed plaintiff, the manager of the school

system's public radio and television stations, that he would recommend that the Board not renew her contract. Although plaintiff was notified of her right to a pretermination hearing and she made a timely request for such a hearing, no pretermination hearing was held and plaintiff was fired on June 30, 1992. The Board initially agreed to give plaintiff a posttermination hearing, but it subsequently informed her that she was not entitled to any hearing at all.

Plaintiff then filed this § 1983 action, seeking and receiving immediate injunctive relief. The trial court ruled that plaintiff had a right to a pretermination hearing on whether the Board had good cause to terminate her employment, and ordered the Board to continue paying plaintiff her salary pending the outcome of the hearing. A hearing was finally held in October 1992, before a panel of the Professional Practices Commission ("PPC"). The panel members unanimously concluded that the Board did *not* have good cause to terminate plaintiff's employment and that plaintiff should be reinstated. Nevertheless, the Board chose to ignore the conclusions of the PPC panel and again voted to fire plaintiff. And, apparently believing it had satisfied the trial court's order by paying plaintiff through the hearing, it again stopped paying her salary.

Plaintiff appealed the local Board's decision to the State Board of Education pursuant to OCGA § 20-2-1160 (b). The State Board ruled in favor of plaintiff in July 1993, finding her termination to be "arbitrary and capricious." Yet the Board *still* refused to reinstate plaintiff, forcing her to bring further motions in the trial court in this case. Indeed, the Board did not reinstate plaintiff

until explicitly ordered to do so by the trial court. Because plaintiff was eventually reinstated, however, the trial court was bound by *Henderson* to hold that plaintiff had been provided an "adequate remedy" and to dismiss her claims for damages and attorney fees.

In *Henderson*, an employee was fired by a county tax commissioner. The employee appealed her termination to the county merit system board, which ruled that she should not have been fired; but the tax commissioner still refused to reinstate the employee. Only when the employee brought a § 1983 action and obtained an order from the trial court was she reinstated with full pay. Yet the trial court then dismissed the plaintiff's claims for damages and attorney fees. We affirmed, relying on *Parratt v. Taylor*, 451 U. S. 527 (101 SC 1908, 68 LE2d 420) (1981)[1] for the proposition that a governmental actor's conduct which deprives a plaintiff of liberty or property can give rise to a procedural due process violation only if "available state remedies are not themselves adequate to provide the claimant with redress for the alleged injury." *Henderson*, 189 Ga. App. at 499. We stated that the plaintiff in *Henderson* clearly had an adequate state remedy since she had been reinstated with full pay – despite the fact that the State administrative remedy had proved ineffective and she was not reinstated until she filed a § 1983 action and obtained a court order. Because the plaintiff's reinstatement with back pay resulted from the § 1983 action itself, rather than from a state remedy, we

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[1] *Parratt* was overruled in part by *Daniels v. Williams*, 474 U. S. 327, 330-331 (106 SC 662, 88 LE2d 662) (1986), but the overruled portion of the decision is not relevant here.

now conclude that Henderson was wrongly decided and must be overruled.

The Board also calls our attention to *Turner v. Giles*, 264 Ga. 812 (4) (___ SE2d ___) (1994), a recent Georgia Supreme Court case in which that Court held that a licensee denied a predeprivation hearing could not state a procedural due process claim as long as the state provided a postdeprivation hearing which resulted in the licensee's reinstatement with back pay. We are not bound by *Turner* because unlike the plaintiffs in *Henderson* and this case, the plaintiff in *Turner* really was reinstated as the result of the postdeprivation hearing provided by the state, rather than as the result of an order of the trial court in the § 1983 action. Moreover, to the extent *Turner* relies on *Parratt* to hold that a postdeprivation remedy may be adequate even if the plaintiff had a right to a predeprivation hearing, it may need to be reconsidered.

In *Parratt*, a prisoner's hobby materials were lost as a result of prison officials' negligence, and the United States Supreme Court held that this deprivation of property could not be the basis for a procedural due process claim because the state provided an adequate remedy for the loss through its state tort claims procedure. 451 U. S. at 544. The *Parratt* rule was extended to intentional but unauthorized acts in *Hudson v. Palmer*, 468 U. S. 517 (104 SC 3194, 82 LE2d 393) (1984), in which a prisoner alleged that a guard who did not like him intentionally destroyed property in his cell. In *Zinermon v. Burch*, 494 U. S. 113 (110 SC 975, 108 LE2d 100) (1990), however, the Supreme Court made it clear that the scope of the *Parratt* rule is limited to its underlying rationale. The actions causing

the deprivations in *Parratt* and *Hudson* were either random or unauthorized, and thus unpredictable from the perspective of the governmental entity. As a result, a predeprivation hearing was simply unfeasible and a postdeprivation hearing was all that could be expected or required. In this type of situation, the governmental entity meets the requirements of procedural due process if it provides for a postdeprivation hearing and remedy. But if the action causing the deprivation is planned and authorized, so that a predeprivation hearing is in fact feasible, a postdeprivation state remedy is *not* constitutionally sufficient. *Zinermon*, 494 U. S. at 115, 132, 136-138.[2] Based on *Zinermon*, therefore, it would appear that if a § 1983 plaintiff has a right to a predeprivation hearing and does not receive one, she states a valid procedural due process claim regardless of the postdeprivation remedies the state provides. See also *Fetner v. Roanoke*, 813 F2d 1183 (11th Cir. 1987) (postdeprivation remedies do not provide due process if predeprivation hearing is practicable).

For these reasons, we conclude that *at least* where it takes a § 1983 action to affect a postdeprivation remedy, a plaintiff with the right to a predeprivation hearing does not lose her § 1983 and § 1988 claims for damages and attorney fees once a postdeprivation remedy is effectuated. It follows that plaintiff may pursue her claims for damages and attorney fees. Indeed, the Board's behavior

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[2] Notably, although *Zinermon* was a five-to-four decision, the dissenters agreed with the majority that the scope of *Parratt* was limited in this manner; they simply disagreed on whether a predeprivation hearing was feasible under the facts presented.

in this case appears to be exactly the type of abuse of power the due process clause and 42 USCA § 1983 were meant to address.

As the record clearly shows a procedural due process violation in this case, summary judgment should be granted for plaintiff with respect to the Board's liability, and plaintiff is entitled to at least nominal damages and attorney fees. See *Carey v. Piphus*, 435 U. S. 247 (98 SC 1042, 55 LE2d 252) (1978); *Farrar v. Hobby*, 506 U. S. (113 SC 566, 121 LE2d 494) (1992). If plaintiff can prove other actual damages, she will be entitled to those;[3] and the jury may also award punitive damages if it finds either that the Board's conduct involved reckless or callous indifference to plaintiff's rights, or that it was motivated by evil motive or intent. See *Smith v. Wade*, 461 U. S. 30 (103 SC 1625, 75 LE2d 632) (1982).

Judgment reversed. McMurray, P. J., Birdsong, P. J., Blackburn and Smith, JJ., concur. Beasley, C . J., Andrews, Johnson, and Ruffin, JJ., concur in judgment only.

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[3] Plaintiff's compensatory damages may include damages for emotional or mental distress if proven. See *Carey*, 435 U. S. at 264.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ADRIENNE DOWLING, Plaintiff, v. ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, in Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, in his Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, in her Personal and Official Capacity, Defendants.	CIVIL ACTION FILE NO. E-4285 (Filed Apr. 1, 1994)

FINAL ORDER

The within and foregoing case having been called for trial on March 31, 1994, due and legal notice having been given to all parties, and it appearing to the Court that Plaintiff has been reinstated in her position by previous Order of this Court, and it further appearing to the Court that on March 30, 1994 this Court entered an Order establishing and awarding to Plaintiff all remaining back pay and benefits due her, and it further appearing to the

Court that Defendants have paid all back pay and benefits ordered to be paid to Plaintiff, and Defendants having moved this Court to dismiss Plaintiff's remaining claims for violation of procedural due process as moot under 42 U.S.C. § 1983 pursuant to the authority of *Henderson v. Sherrington*, 189 Ga. App. 498, 376 S.E.2d 397 (1988), and it appearing to the Court that this case is controlling and that Plaintiff has no remaining cause of action for damages for alleged violation of her procedural due process rights under 42 U.S.C. § 1983, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff recover nothing further from Defendants and that Plaintiff's remaining claims and all other claims of Plaintiff herein not previously adjudicated are hereby dismissed and judgment is rendered for Defendants on all remaining claims. This Order shall constitute a Final Order and Judgment in this action.

This 1st day of April, 1994.

ELIZABETH E. LONG, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

PREPARED BY:

/s/ Bruce H. Beerman
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ADRIENNE DOWLING, Plaintiff, v. ATLANTA CITY SCHOOL DISTRICT, ET AL., Defendants.	)	CIVIL ACTION FILE NO. E-04285 (Filed Aug. 16, 1993)

ORDER

The Court has considered the Plaintiff's Motion for Summary Judgment. The Court ruled on May 14, 1993, that it would entertain a renewed motion at the conclusion of an appeal to the State Board of Education ("State Board"). On July 9, 1993, the State Board rendered its decision. Based upon a thorough review of the file in this case, the Court makes the following findings of fact and conclusions of law:

1.

In July, 1986, the Atlanta City Board of Education ("City Board") hired the Plaintiff to be its Director of Telecommunications, a position that does not require certification as a teacher under Georgia law. In April, 1990, the City Board sent a letter to the Plaintiff acknowledging her tenure status. On April 13, 1992, the City Board informed the Plaintiff that her contract would not be renewed, but that the Plaintiff, as a tenured employee,

had rights under the Fair Dismissal Act (O.C.G.A. § 20-2-940), including the right to a pre-termination hearing.

2.

The Plaintiff requested the City Board to conduct a pre-termination hearing within the statutory period, but the City Board terminated the Plaintiff's employment on June 30, 1992, without a hearing. On August 20, 1992, this Court granted the Plaintiff's request for a temporary restraining order acknowledging the Plaintiff's property right to continued employment and requiring the City Board to conduct a hearing on the grounds for the Plaintiff's termination. Under this order, the Plaintiff was to receive pay until all the requirements of procedural due process were met.

3.

In October, 1992, a tribunal established by the Professional Practices Commission Tribunal ("PPC Tribunal"), specifically found that the Plaintiff had not violated any school policies, and that the situations found in the operation of two stations under her supervision were not caused by the Plaintiff's conduct. The PPC Tribunal recommended that the City Board reinstate the Plaintiff to her position. On November 9, 1992, the City Board voted not to renew the Plaintiff's contract.

4.

The Plaintiff appealed this decision to the State Board. After some procedural wrangling between the City Board and the Plaintiff, the State Board heard the appeal and rendered its decision on July 8, 1993. The State Board found that the Plaintiff, as a non-certificated employee, was not entitled to the protections of the Fair Dismissal Act as a matter of statutory law and that the State Board lacked jurisdiction to determine whether the Plaintiff was entitled to these protections as a matter of contract. The State Board also found that the Plaintiff could avail herself of the protections of O.C.G.A. § 20-2-1160. Under that statute, the State Board found that the City Board's decision not to renew the Plaintiff's contract was arbitrary and capricious in light of the PPC Tribunal's findings. The State Board reversed the decision of the City Board on this ground.

5.

This Court agrees with the State Board's conclusion that the Plaintiff is not entitled to the protections of the Fair Dismissal Act as a matter of statutory construction. However, "where no formal system of tenure exists, due process may be mandated nonetheless where state rules or understandings between the parties support a claim of entitlement to continued employment." *LaPier v. Holliman*, 514 F. Supp. 692 (N.D. Ga., 1980). It is clear from the City Board's letter recognizing her tenure status and its letter notifying the Plaintiff of the non-renewal of her contract, that all parties understood that the Plaintiff was entitled to continued employment.

6.

The contractual property right created by the City Board invokes procedural due process. Since the provisions of the Fair Dismissal Act describe the process afforded to a tenured employee whose contract will not be renewed, the Plaintiff was entitled to the protections of that Act.

IT IS THEREFORE ORDERED AND ADJUDGED that summary judgment be **GRANTED** to the Plaintiff on the issue of liability under the Fair Dismissal Act. A further evidentiary hearing is necessary on the issues of reinstatement and back pay (or front pay).

SO ORDERED this 12th day of August, 1993.

/s/ Elizabeth E. Long
Elizabeth E. Long, Judge
Superior Court of
Fulton County
Atlanta Judicial Circuit

cc: R. Mason Barge, Esq.
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No. 95-1848

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT, JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D.F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity, LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity, and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Statement of Facts And Procedural History

Petitioner, Adrienne Dowling, was initially employed by the Atlanta Board of Education in 1986 as General Manager for its public broadcasting stations, WABE Radio and WPBA Television. The Atlanta Board of Education operates these stations as licensee, providing telecommunications assistance in the education of students in the Atlanta Public Schools and the general public in the Atlanta metropolitan area.

As problems with Petitioner's job performance became apparent, Respondents questioned the viability of Petitioner's continued employment in the Atlanta Public Schools. In the fall of 1991, Dr. Myrtice M. Taylor, Associate Superintendent for Instruction in the Atlanta Public Schools and Petitioner's immediate supervisor, conducted a series of meetings with Petitioner to discuss her job deficiencies. These meetings were initiated by Dr. Taylor's issuance of a written notification of deficiencies to Petitioner, including a notice that the continuation of Petitioner's deficiencies would likely result in a recommendation that her employment be terminated.[1] The Superintendent also issued a notification that Petitioner needed to make specific improvements to permit continuation of her employment. In her meetings with Dr. Taylor,

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[1] R-113, 123; Exhibit E, p. 2.

Petitioner was given the opportunity to correct any misimpressions and to respond prior to the April 15th deadline imposed by Georgia law.[2] Petitioner's responses to Dr. Taylor were deemed unsatisfactory and, accordingly, Dr. Taylor recommended to Dr. Lester W. Butts, Superintendent of Schools, that Petitioner's contract of employment not be renewed for the 1992-1993 school year.

By correspondence dated April 13, 1992, Superintendent Butts notified Petitioner that he would not recommend renewal of her contract to the Atlanta Board of Education. Petitioner appealed the Superintendent's decision and, on or about June 16, 1992, the Atlanta Board of Education referred the matter for hearing to the Professional Practices Commission of Georgia ("PPC") pursuant to the Fair Dismissal Act.[3]

The School District continued to pay Petitioner's salary through July 15, 1992, the date that the PPC scheduled the matter for a hearing before a tribunal of educators. This hearing was continued by the PPC when Petitioner's counsel refused to stipulate that the attorney provided by the PPC to rule on issues of law was "disinterested" because that attorney represented boards of

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[2] O.C.G.A. § 20-2-211(b) requires public school systems to give employees notice of an intention not to renew their contracts of employment by April 15th or else such contracts are deemed renewed by operation of law.

[3] The Georgia Fair Dismissal Act is O.C.G.A. § 20-2-940, et seq.

education other than the Atlanta Board of Education.[4] The hearing was then rescheduled and, even when Petitioner filed her lawsuit in this case, a hearing had been scheduled before the Professional Practices Commission for September 15, 1992.[5]

On August 19, 1992, Petitioner filed the instant action in the Superior Court of Fulton County, Georgia claiming that Respondents had violated the Fair Dismissal Act in failing to hold a hearing prior to terminating her employment[6] and that she was therefore entitled to reinstatement, back pay, punitive damages, and other relief. In addition to her Fair Dismissal Act claims, Petitioner generally alleged that she had been deprived of property without due process of law. On August 20, 1992, a presiding Superior Court judge entered a temporary restraining

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[4] R1-220, R-147.

There were two "records" of this case transmitted to the Supreme Court of Georgia at separate stages. The record in case no. S93A1330 will be designated with a citation to "R1"; citations to the record before the court in case no. S95C1083 (the final decision) are cited as "R".

[5] R1-42; see also *Affidavit of Adrienne Dowling* filed in support of her motion for TRO, at ¶12 ("The Schools have rescheduled the hearing for September 15, 1992.")

[6] The Fair Dismissal Act provides for a full evidentiary hearing, complete with the power to subpoena witnesses, prior to the termination of a tenured teacher. O.C.G.A. § 20-2-940. Both the State Board of Education (R-207-234) and the Superior Court judge to whom the case was assigned (R-235-38) determined that Petitioner was not covered by the Fair Dismissal Act but that Petitioner's property interest in continued employment arose from a contract which incorporated the terms of the Fair Dismissal Act. See Appendix to Petition for Certiorari at A14-17.

order in Petitioner's favor, enjoining Respondents from discontinuing Petitioner's salary until she was provided with a full administrative hearing under the Fair Dismissal Act. Respondents fully complied with that order and Petitioner received her full salary until after the hearing held by the Professional Practices Commission on October 4, 5, and 8, 1992 and the publication of its report on October 27, 1992.

On November 9, 1992, the Atlanta Board of Education voted to uphold the Superintendent's recommendation that Petitioner's contract not be renewed and to dismiss Petitioner from the Board's employ. The Board took this action based upon particular findings contained in the PPC's report regarding serious performance failures and inadequacies on the part of Petitioner. Petitioner then appealed the Board's action to the State Board of Education pursuant to O.C.G.A. § 20-2-1160. On July 8, 1993, the State Board of Education reversed the Atlanta Board of Education's decision not to renew Petitioner's contract of employment. Following that decision, the Superior Court first granted Petitioner summary judgment on her claim under the Fair Dismissal Act and then entered an order directing that Petitioner be reinstated and that all back pay and other benefits be paid to her by the Atlanta Board of Education. Respondents fully complied with that order and there is no issue in this case with respect to the fact that Petitioner has received all back pay and benefits to which she might be entitled.[7]

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[7] See Appendix to Petition for Certiorari, at A12-13.

Following Petitioner's reinstatement, the case was called for jury trial on March 31, 1994, on the issue of Petitioner's claim under 42 U.S.C. § 1983. At the call of the case, counsel for Respondents moved that the claim be dismissed and, on April 1, 1994, the trial court dismissed the remaining claims.[8] The trial court subsequently awarded Petitioner attorneys' fees of approximately $28,000.00.

B. Petitioner Failed To Raise Or Preserve For Review Any Issue Regarding Substantive Due Process Rights Which She Now Seeks To Have Reviewed

In the third of her Questions Presented, Petitioner asserts that this Court should grant certiorari to review whether she was deprived of substantive due process rights. Although Petitioner asserts that she presented this issue to the Supreme Court of Georgia, she fails to provide any citation to the record in support of this claim and Respondents' review of the briefs to the Georgia Court – which heard the case on Respondents' Petition for Certiorari – fails to reveal any claim by Petitioner that she was deprived of substantive due process rights in this case.[9] Even Petitioner's complaint only raises the issue of

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[8] *Id.*

[9] Dowling's brief in response and opposition to the Board's Petition for Certiorari filed in the Georgia Supreme Court states:

> The Petition has cited a number of federal cases for the proposition that Dowling cannot recover damages under § 1983 for a violation of substantive due process. The Court of Appeals, however, did not address a violation of substantive due process.

due process under the 14th Amendment in the context of her alleged dismissal without a hearing. (R-1). Not even the vaguest reference is made in the complaint to the argument stated in this Petition – that Respondents' termination of Petitioner's employment violated a "fundamental right" because another hearing body determined that the Board of Education had inadequate grounds to effect a termination.

C. Petitioner Has Made Significant Misstatements Of The Facts

Throughout her Petition, Adrienne Dowling has represented to this Court that Respondents terminated her employment without any pre-deprivation hearing whatsoever. This representation is patently false. As found by the trial court and as further demonstrated by the full record in the case, Petitioner was afforded several hearings prior to the Superintendent's notification that he would not recommend renewal of her contract for the 1992-1993 school year.[10] Petitioner was also given the

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> Rather, it allowed Dowling to seek damages for a violation of procedural due process, as required by clear and binding authority of the United States Supreme Court.

Response of Adrienne Dowling In Opposition To Petition for Writ of Certiorari, p. 11. If Petitioner intended this statement to be a timely and proper invocation of a claim that she was denied substantive due process, the effort failed. The question was simply not raised or, if raised, was not preserved for review by this Court.

[10] In its Temporary Restraining Order dated August 20, 1992, the trial court held: "Although several hearings were held

opportunity to have a full evidentiary hearing before a neutral tribunal of educators before suffering any termination of pay or benefits.[11]

In addition, Petitioner repeatedly refers to the time period during which she was allegedly deprived of property without due process as being 18 months.[12] In fact, however, a full evidentiary hearing was scheduled regarding Petitioner's appeal on July 15, 1992 before the Georgia Professional Practices Commission and was continued only because of Petitioner's objection to the attorney appointed by the PPC to rule on issues of law.[13],[14] As

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in October, 1991, on certain charges against Dowling, these hearings were insufficient to comply with the Fair Dismissal Act." See also *supra* where details of the Respondents' meetings with Petitioner are described and the record citations are made.

[11] R1-220, R-147.

[12] See, for instance, the Questions Presented, nos. 1 and 2; Petition, p. 7.

[13] Petitioner acknowledges the truth of this statement, but attributes the "fault" for the failure of the hearing to go forward to Respondents. Petition for Certiorari, p. 4 at fn. 2. While Petitioner was authorized to present objections regarding the attorney appointed by the PPC as well as notice issues under the Fair Dismissal Act, there is no support for Petitioner's assertion that the hearing was "constitutionally inadequate."

[14] The statement of facts as presented by Petitioner obliquely raises the question of why the Professional Practices Commission would have scheduled the first hearing opportunity for Petitioner after the expiration of her current contract. The answer to this question does not appear anywhere in the record of this case, but it may be helpful to the Court to know that hearings under the Fair Dismissal Act are frequently scheduled during the summer months in "non-renewal" cases. The teachers who are the subject of such hearings continue to

of August 20, 1992, Respondents resumed Petitioner's salary pursuant to the trial court's entry of a temporary restraining order, a fact also acknowledged by Petitioner. Moreover, Petitioner had a full hearing on October 4, 5, and 8, 1992 and has never challenged the adequacy – either under the Fair Dismissal Act or under the 14th Amendment – of that hearing. Thus, Petitioner's references to an 18 month-long deprivation of property without due process are simply unfounded.[15] Petitioner was out of her office without pay only from the time of the scheduled hearing on July 15, 1992 until the entry of a temporary restraining order on August 20, 1992.[16]

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receive their annualized salary during the summer months when their teaching obligations under the contracts at issue have ended, so the summer scheduling does not require the teacher to miss either work or pay in the usual case. In this case, however, Petitioner was a year-round employee and was thus instructed to leave her office for the short period between the end of her contract and the first scheduled hearing date, although her pay was continued until such date.

[15] To the extent that Petitioner might be asserting that she was deprived of a constitutionally protected property interest until she was reinstated in her position as general manager, Petitioner's argument fails because she had no property interest in actually holding the office or performing the duties of that job under Georgia law. *Rodgers v. Georgia Tech Athletic Association*, 166 Ga. App. 156, 303 S.E.2d 467 (1983); see also *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School Dist.*, 774 F.2d 618 (4th Cir. 1985).

[16] There is no issue regarding the fact that Respondents continued to pay Petitioner from the expiration of her contract on June 30, 1992 through the date of the first scheduled hearing before the Professional Practices Commission on July 15, 1992. See Petition for Certiorari, p. 4.

Finally, it should be noted that Respondents do not agree with Petitioner's statement, on page 7 of the Petition, that the "facts underlying the later violations of due process are uncontested. . . . " Respondents do not agree that there were any "later violations of due process." This Petition raises for consideration only a question of alleged deprivation of pre-termination procedural due process. No other alleged violations of due process were raised in Petitioner's complaint or preserved for review by this Court.[17] As Petitioner has not stated exactly what "facts" she contends are uncontested, and as she has misstated such important specific facts, Respondents can not leave unopposed any impression that they agree with whatever additional facts Petitioner might deem uncontested.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction

In this section, Respondents will discuss the many reasons why the Petition should be denied and will demonstrate that this case is a poor vehicle for the Court's review of the questions presented by Petitioner. First, the

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[17] Petitioner has sought review of a claim that she was deprived of substantive due process, but that issue also was neither raised below nor otherwise preserved for review by this Court. See *supra*. Additionally, the parties' dispute regarding appellate procedure under the Fair Dismissal Act, litigated in the Georgia appellate courts, does not constitute a constitutional due process claim.

facts of the instant case do not present the issues Petitioner raises. Respondents will next show that the decision of the Supreme Court of Georgia does not directly contradict a prior decision of this Court as asserted by Petitioner. In addition, the cases cited by Petitioner fail to support the claim that there exists a significant conflict among lower courts on the issues raised. Finally, Petitioner has failed to demonstrate that the issues in this case require any further resolution by this Court. In light of the Court's recent and repeated refusals to grant certiorari in cases with similar issues, Petitioner has failed to show why this case requires the review sought.

B. The Facts Of This Case Do Not Present The Issues Raised By Petitioner

Petitioner asserts that her version of disputed facts must be accepted by this Court because it arises from a motion to dismiss granted on a question of law. While Petitioner is correct in the assertion that a complaint dismissed for failure to state a claim will be reviewed considering all allegations of fact as true, this rule of law is inapplicable in the instant case. Unlike a complaint dismissed for failure to state a claim without any record having been established, this case was decided on mixed questions of law and fact (adequacy of state remedies)[18] more than 18 months after the complaint was filed and after the facts had been established in a number of hearings and in a motion for summary judgment.

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[18] Petition for Certiorari at A12-13.

In the instant case, an order of the trial court established that "several hearings were held in October, 1991, on certain charges against Dowling."[19] The record further establishes that Petitioner's supervisor held meetings with her to discuss these charges and that Petitioner had an opportunity to respond to her employer's allegations and concerns.[20] Finally, the record in this case establishes that Petitioner was afforded an opportunity for a full evidentiary hearing before the Professional Practices Commission before Respondents discontinued payment of her salary.[21] These procedural facts authorized the trial court to make a determination as a matter of law that Petitioner had not been deprived of a protected property interest without due process of law.

Care must be taken to distinguish among the issues involved in the various court orders in this case on the question of pre-termination hearings. Until the trial court's dismissal of Petitioner's claims under 42 U.S.C. § 1983 on April 1, 1994, the issue being litigated and decided in every instance was whether Dowling was entitled to, and then whether she had been afforded, hearings which complied with the provisions of the Fair Dismissal Act, incorporated into her contract. The Fair Dismissal Act, however, requires far more extensive pre- and post-termination procedures than does the 14th Amendment. None of the tribunals which heard this case, including the trial court, the State Board of Education, the Georgia Court of Appeals and the Supreme Court of

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[19] Temporary Restraining Order dated August 20, 1992, ¶ f.

[20] R-113, 123, Exhibit E, p. 2.

[21] See Petition for Certiorari, p. 4 at fn. 2.

Georgia ever found that the pre-termination process afforded to Petitioner by Respondents was inadequate under the 14th Amendment to the Constitution and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).[22]

Since the facts in this case demonstrate that Petitioner received all of the pre-termination process that she was due under the 14th Amendment, the case fails to present the issues raised by Petitioner which are premised upon the incorrect assertion that Dowling was not afforded pre-termination due process. Similarly, it is not necessary that the Court determine whether the procedural and compensatory remedies afforded Petitioner were adequate to remedy a procedural deprivation as the case does not present the procedural due process violation urged by Petitioner.

However, as argued below, although the record in this case establishes that Petitioner *did* receive adequate pre- and post-termination hearings, this case was properly decided by the Georgia Supreme Court without an explicit finding to that effect because the undisputed facts of record show that the State of Georgia afforded Petitioner adequate procedures to remedy any technical procedural deprivation that may have occurred and that Petitioner, in fact, utilized those procedures and received full due process.

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[22] See fns. 1, 10, *supra*.

C. The Decision Of The Supreme Court Of Georgia Does Not Directly Contradict A Prior Decision Of This Court

Petitioner's central argument in this case is that the decision of the Georgia Supreme Court must be reversed because it directly contradicts this Court's holding in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Essentially, Petitioner argues that *Zinermon* will always authorize an action for damages under 42 U.S.C. § 1983 where a governmental agency fails to provide a pre-termination hearing, because actions of the agency can never be considered to be random or unauthorized. Thus, Petitioner asserts, the adequacy of any later state-provided procedures is not relevant and her claims under § 1983 were improperly dismissed in the instant case. The following arguments demonstrate the fallacy of Petitioner's assertion.

The Georgia court did not base any part of its decision upon a finding that Respondents' actions were random or unauthorized. In fact, the lower court did not engage in any discussion at all of the so-called "*Parratt/Hudson* exception"[23] but instead based its decision upon a rule firmly embraced by this Court in *Zinermon* – that a deprivation without due process does not become an

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[23] In *Parratt v. Taylor*, 451 U.S. 527 (1981) and its progeny this Court established that where pre-deprivation due process is impossible because the deprivation results from a random or unauthorized act of a state actor whose conduct the State could not anticipate, adequate post-deprivation remedies are all that may be required by the Constitution.

actionable violation of due process unless and until the State fails to provide adequate remedies.[24]

In *Zinermon*, the plaintiff, while medicated and disoriented, signed forms requesting admission to, and treatment at, a Florida mental hospital, in apparent compliance with state statutory requirements for "voluntary" admission to such facilities. After his release, plaintiff brought suit under 42 U.S.C. § 1983 on the ground that defendants had deprived him of his liberty without due process of law. Plaintiff's complaint in that action alleged that state officials had violated state law by admitting him as a voluntary patient when they knew or should have known that he was incompetent to give informed consent to his admission, and that their failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The Court found that the State of Florida had "broadly delegated, uncircumscribed power to effect the deprivation at issue,"[25] and concluded that the plaintiff's allegations were sufficient to state a § 1983 claim based on the State's failure under Florida law to provide adequate pre-deprivation procedures to prevent the loss of which the plaintiff was complaining. The Court in *Zinermon* did not, however, hold that when a government agency itself fails

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[24] Petition for Certiorari at A3, citing *Zinermon v. Burch*, 494 U.S. 111, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) and *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994).

[25] *Zinermon, supra*, 494 U.S. at 136, 110 S.Ct. at 989. Specifically, the hospital staff in Florida had "broad power and little guidance", *id.*, to determine when the involuntary commitment procedures should be invoked and a hearing held.

to hold a hearing required by due process, a claim for damages under 42 U.S.C. § 1983 will automatically become cognizable.

In contrast to the underlying law in *Zinermon*, Georgia law at issue in this case requires procedures which provide no discretion to the governmental agency charged with providing due process. The Fair Dismissal Act gives the teachers to whom it applies an absolute right to a full hearing upon request and full rights of appeal. O.C.G.A. §§ 20-2-940, et seq; 20-2-1160. These procedures have been held to be constitutionally adequate. See, e.g., *Holley v. Seminole County School District*, 755 F.2d 1492 (11th Cir. 1985). In the instant case, despite the fact that Petitioner was not a teacher to whom the Fair Dismissal Act applied by statutory mandate, the trial court determined that Dowling was entitled to the procedures required by the statute because her contract incorporated the Act's procedural provisions.[26]

Furthermore, beyond the procedures required by the State of Georgia in the Fair Dismissal Act, Georgia affords, and afforded to Petitioner, full access to the courts when a local board of education fails to provide a hearing required by law. *Board of Education of Richmond County v. Young*, 187 Ga. 644, 1 S.E.2d 739 (1939).

These elaborate, nondiscretionary, State-provided procedures which were both available to and utilized by Petitioner are unlike any of the statutes and procedures at issue in *Zinermon* and markedly distinguish this case

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[26] Petition for Certiorari, at A16-17.

from that decision. The *Zinermon* decision was determined by the absence of adequate state procedures and remedies, not simply the identity of the governmental actor. In stark contrast to the procedures at issue in *Zinermon*, Georgia provided adequate state procedures and remedies to Petitioner to remedy any procedural deprivation she suffered. Accordingly, the decision of the Supreme Court of Georgia does not directly contradict a prior decision of this Court.

D. The Cases Cited By Petitioner Fail To Demonstrate A Significant Conflict Among State Courts Of Last Resort Or Federal Courts Of Appeal

While Respondents do not agree with Petitioner's argument that this case is controlled by *Zinermon*, there is no dispute that, if the merits of this case were to be reviewed by this Court, resolution of the issues presented would require an analysis of the facts in light of this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon v. Burch*, 494 U.S. 113 (1990) because, in essence, Petitioner claims that this case should be controlled by the *Zinermon* decision and that the Georgia Supreme Court's decision is contrary to the law established in that case.

Respondents concede that friction may exist among the Court's decisions in *Parratt*, *Hudson* and *Zinermon*, as well as the decisions of the state and lower federal courts attempting to apply them,[27] but any lack of complete

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[27] See, e.g., Alexander, "Constitutional Torts, the Supreme Court, and the Law of Noncontradiction: An Essay on Zinermon

harmony does not amount to a conflict so widespread or significant that the issue demands resolution by the Court. In fact, almost all of the cases cited by Petitioner to demonstrate the existence of a conflict fail to even present a disagreement with the decision reached by the Supreme Court of Georgia.

For instance, although Petitioner cites a number of cases as being in "conflict" with the case at bar, a proper reading of the following decisions relied upon by Petitioner shows that they actually support the result reached by the Georgia court: *Irby v. Macht*, 522 N.W.2d 9 (Wis. 1994) (holding that prison officials acted in a random and unauthorized manner when they violated state law as to which they had no discretion and the existence of adequate state remedies barred a § 1983 action as to this conduct); *Cooperman v. University Surgical Associates, Inc.*, 513 N.E.2d 288 (Ohio 1987) (holding that complaint failed to state a claim for relief under § 1983 because of the existence of adequate post-deprivation state remedies); *Wilhelm v. Gray*, 766 P.2d 1357 (Okl. 1988) (affirming dismissal of plaintiff's complaint because Oklahoma law provided adequate and meaningful remedies for the alleged deprivation of liberty).

Other cases cited by Petitioner to evidence the existence of a conflict requiring resolution by this Court do not demonstrate a conflict at all because the cases do not involve a question of procedural due process and thus are

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v. Burch," 87 Nw.U.L. Rev. 576 (1993) and Juarez, "The Supreme Court as the Cheshire Cat: Escaping the Section 1983 Wonderland," 25 St. Mary's L.J. 1 (1993).

not applicable, *Brosterhous v. State Bar of California*, 906 P.2d 1242 (Cal. 1995) (although the case did not involve a claimed deprivation of property or liberty without procedural due process, the court noted, at fn. 6, that such a claim would be barred by the existence of adequate state remedies); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991) (plaintiff alleged unwarranted arrest and beating by officers which are substantive, not procedural, violations), or because the courts at issue reached their decisions on other grounds not at issue here, *Owens v. City of Phoenix*, 884 P.2d 1100 (Ariz. App. 1994) (cause of action stated under § 1983 for city's failure to enact and follow adequate procedures); *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983) (state courts of North Dakota have subject matter jurisdiction over § 1983 claims); *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir. 1992) (dismissal of due process claim reversed because state remedies were inadequate).

Although Respondents have not undertaken to discuss the cases cited by Petitioner as being consistent with the decision below, it bears noting that Petitioner omitted from her list of consistent cases the primary authority relied upon by the Georgia court, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994), the recent previous decision by the Georgia Supreme Court in *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995), and decisions from other circuits not mentioned, including the Second, *Young v. Hoffman*, 970 F.2d 1154 (2nd Cir. 1992); Third, *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996); Fourth,

Fields v. Durham, 909 F.2d 94 (4th Cir. 1990); Fifth, *Charbonnet v. Lee*, 951 F.2d 638 (1992); and Ninth, *Raditch v. United States*, 929 F.2d 478 (9th Cir. 1990).

Only two of the cases cited by Petitioner, *Moore v. Warwick Public School District No. 29*, 794 F.2d 322 (8th Cir. 1986) and *Kellog v. City of Gary*, 562 N.E.2d 685 (Ind. 1990) appear to be irreconcilable with the result reached by the Supreme Court of Georgia and not distinguishable on other grounds. However, as discussed below, the existence of this discord has not proven worthy of further consideration by this Court to date and Petitioner has failed to identify any compelling reasons why it should be addressed now.

E. Petitioner Has Failed To Demonstrate That The Issues In This Case Require Further Resolution By This Court

In a number of recent cases, including *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994) and *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995), this Court has been presented with an opportunity to review on certiorari the very questions raised by Petitioner here and has declined to do so. These two cases, relied upon by the Georgia Supreme Court in its decision below, are entirely consistent with the present case on the issues involved.

Most recently, in *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996), the Court declined to review another

decision from a circuit court of appeals which held that the adequacy of post-termination remedies provided by the state, including access to state courts, was a sufficient remedy for any alleged pre-termination procedural deprivation. In that case, a tenured college professor brought suit under § 1983 claiming that he was denied pre-termination procedural due process because the procedure afforded to him was a sham. Relying upon *McKinney v. Pate,* the district court in *McDaniels* held that the sufficiency of the post-termination protections afforded to the plaintiff rendered irrelevant any claim of a pre-termination deprivation. The Third Circuit, relying upon *Zinermon* and *McKinney,* held that the college was not required to provide McDaniels with a hearing before an impartial decisionmaker prior to a termination decision and that McDaniels was not deprived of procedural due process because the state provided him sufficient post-termination process to protect his property rights. *Id.*

Petitioner has failed even to argue that the instant case can be distinguished in any way from these cases which were found unworthy of plenary review, choosing instead to argue that the Court should hear this case because the State of Georgia consistently defies the law and violates the rights of its citizens.[28]

As shown above, this case is entirely consistent with established case law in the vast majority of states and

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[28] See, e.g., Petition for Certiorari at p. 18 where Petitioner cites *Turner v. Giles* as authority for the proposition that Georgia's "refusal to enforce the requirement of predeprivation due process is well-established."

federal judicial circuits. Because this Court has not previously found any compelling reason to revisit its decisions in *Parratt, Hudson,* and *Zinermon* under like circumstances, nor has it presently been given any such compelling reason in this case, Petitioner has failed to demonstrate that the issues in this case require further resolution by this Court.

F. The Case Was Correctly Decided By The Supreme Court Of Georgia

1. The decision below correctly applied the law in holding that Georgia procedural remedies, including access to the courts, cured any procedural deprivation suffered by Petitioner

In *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990), this Court held that

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. [Cits]. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Consistent with this holding, and the Court's previous decisions in *Parratt* and *Hudson*, the Eleventh Circuit Court of Appeals held in *McKinney v. Pate, supra*, that where an employee allegedly deprived of due process in an employment termination context is given access to the state courts under state law, and where the state courts have the power to provide the procedural relief to which the employee claims entitlement, a hearing by the governmental employer and compensation for any loss suffered as a result of the deprivation, such state procedures satisfy procedural due process and no constitutional violation actionable under § 1983 has occurred. *Id.* at 1563-4. As the *McKinney* court stated, "the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id.* at 1557, citing *Zinermon*.

Subsequent to its decision in *McKinney v. Pate*, the Eleventh Circuit Court of Appeals addressed the adequacy of Georgia procedures and held in *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994), that a Georgia procedure virtually identical to that utilized by Petitioner herein was constitutionally adequate and would bar a claim for damages under 42 U.S.C. § 1983 in federal court for a procedural due process violation:

> [I]t is "only the state's refusal to provide a means to correct any error . . . [that] would engender a procedural due process violation." *McKinney*, 20 F.3d at 1563. . . . [T]he post-deprivation remedies available under Georgia law are adequate; the State Personnel Board, and the

> state courts upon reviewing the Board's decision, have the power to grant reinstatement and to compensate employees for back wages and other lost benefits. See *Department of Corrections v. Colbert*, 202 Ga. App. 27, 413 S.E.2d 498, 500 (1991) (discussing procedure for presenting claim for back pay and other benefits); *Georgia Dept. Of Labor v. Sims*, 165 Ga. App. 856, 298 S.E.2d 562, 563 (1982) (awarding reinstatement and back pay to terminated employee).

Narey v. Dean, 32 F.3d at 1527. The court then held that since Georgia law clearly gave the state courts the power to grant reinstatement and to compensate terminated employees for back wages and other lost benefits, no violation of due process occurred.

Without question, state remedies – procedural, equitable, and compensatory – were available and were provided to Petitioner by the State of Georgia. The trial court effected the procedural remedy to which Petitioner claimed entitlement and she received both a full and complete hearing and a continuation of her salary until the hearing was held.[29] When the state administrative process failed to afford Petitioner the reinstatement and

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[29] Unlike the plaintiff in *Zinermon v. Burch* who suffered a completed violation of his rights before he was able to bring an action in state court because of his incapacity, Petitioner filed her state court suit shortly after her salary was discontinued and could have, under available state procedures, filed her suit on June 30, the same day as she was allegedly terminated without a prior hearing. Thus, Georgia provides a means by which Petitioner could have secured immediate judicial review and remedy and this case is, on that ground, wholly different from *Zinermon*.

additional pay she sought, again the state court provided these remedies. The state procedures available to and utilized by Petitioner were clearly adequate to secure all procedural due process to which Petitioner was entitled. The Supreme Court of Georgia thus correctly held that because the procedures and other remedies provided to Petitioner by state statutes and the state court were adequate to redress any procedural deprivation that Dowling suffered, Petitioner's § 1983 claim was properly dismissed.

2. The equitable and compensatory remedies provided by the State of Georgia are adequate to address the alleged deprivation

While acknowledging that the equitable and compensatory remedies she received – reinstatement with back pay and benefits – might be adequate "in some circumstances" (Petition for Certiorari at 17), Petitioner argues that she was not provided with adequate state remedies in this case. As shown below, these arguments do not merit review by this Court.

a. The remedies provided to Petitioner, while not identical to those available under 42 U.S.C. § 1983, were adequate

This Court has previously held that the remedies provided by the state need not be identical to those which might be available under § 1983 in order to be adequate and satisfy due process. *Parratt v. Taylor, supra,* 451 U.S. at 544, 101 S.Ct. at 1917. A state remedy will not be rejected unless it is "inadequate to the point that it is meaningless

or nonexistent." *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990), cert. denied, 111 S.Ct. 783 (1991); *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 955 (11th Cir. 1986). As shown *supra*, the reinstatement with back pay, benefits and fees awarded to Petitioner were fully adequate remedies in this case.

Petitioner argues, however, that she was deprived of due process because she was not allowed to pursue claims, such as her claim for punitive damages, and because she was not reinstated during the pendency of this litigation in the state court,[30] relief which she would not have been afforded even if her claims under § 1983 were not dismissed. See, e.g., *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (punitive damages may not be awarded against governmental entity). Furthermore, at all times when Petitioner moved for, and the state court denied, reinstatement on an interlocutory basis, Petitioner's cause of action under 42 U.S.C. § 1983 was pending. Accordingly, Petitioner's arguments are wholly without merit and raise no issue for review by this Court.

b. Petitioner has misrepresented Georgia law on the issue of sovereign immunity

In a final attempt to show that Georgia does not provide adequate remedies for the deprivation claimed by Petitioner, Dowling asserts that the State would deny her a tort remedy through application of sovereign immunity. (Petition for Certiorari at 16, citing O.C.G.A.

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[30] Petition for Certiorari at 16-18.

§ 20-2-992[31] and *Truelove v. Wilson*, 159 Ga. App. 906, 285 S.E.2d 556 (1981). Petitioner has absolutely misrepresented Georgia law.

In *Truelove v. Wilson, supra*, the Georgia Court of Appeals reversed a trial court's denial of summary judgment to a local board of education, the school district, and individual employees whose negligence allegedly contributed to the wrongful death of the plaintiffs' daughter. The Court held that the defendants were entitled to sovereign immunity against the plaintiffs' claims specifically because the complaint raised only negligence claims, but restated the rule of law that acts committed by a government employee outside the scope of his or her authority or intentional, wilful or malicious acts "will remove the shield of sovereign immunity." *Truelove*, 159 Ga. App. at 908 (citing *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980); *Holloway v. Dougherty County School System*, 157 Ga. App. 251, 277 S.E.2d 251 (1981)).

Of course, Petitioner has alleged that Respondents' conduct was intentional, wilful and malicious because there can be no cause of action for a negligent deprivation

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[31] The statute provides:

> Nothing in this article shall be construed as waiving any immunity or privilege now or hereafter enjoyed by the State Board of Education, by the board of control of any cooperative educational service agency, by any local board of education, by any member of any such board, or by any employee of the state board, school superintendent, principal, teacher, administrator, or other employee or as waiving any immunity or privilege of any state or other public body, board, agency, or political subdivision.

of property under 42 U.S.C. § 1983. *Daniels v. Williams*, 474 U.S. 327 (1986). Thus, contrary to Petitioner's representation, sovereign immunity would not bar a tort claim in Georgia for a tort committed with the degree of intent alleged by Petitioner.

CONCLUSION

Petitioner in this case was afforded all of the process she was due under the 14th Amendment in connection with Respondents' termination of her employment in June 1992. Even if, *arguendo*, Petitioner was not afforded a pre-termination hearing as she claims, she did not suffer a violation of her right to due process because the State of Georgia provided her with fully adequate procedures to remedy that alleged failure as well as compensation for the deprivation in the form of back pay, restoration of benefits, and attorneys' fees.

The decision of the Supreme Court of Georgia does not warrant review by this Court for any of the reasons asserted by Petitioner. Furthermore, to the extent that a lack of complete harmony exists among the state and federal courts in the application of this Court's prior decisions, the specific posture of this case makes it a poor vehicle for the Court's review of the issues raised by the Petitioner.

For all of the above-stated reasons, Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 95-1848

In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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A. Misstatements of Record Evidence.

The facts stated in Dowling's Petition are correct; the contrary facts stated in the Brief in Opposition are demonstrably false and, at several critical points, simply fabricated. It is inconceivable that the Respondents have made so many direct factual misrepresentations to the United States Supreme Court, with an intention to deceive it. In fairness, the Respondents have retained new counsel for this Petition, and one must ascribe these errors to a hurried review of an unfamiliar record.

No matter how innocent it might be, however, the Brief in Opposition repeatedly and grossly misrepresents relevant facts in the record. Dowling asks that the Court's consideration of her Petition not be influenced by a Brief so entirely inaccurate. The Brief in Opposition admits, as it must, the confusion among the states and circuits on the issues presented, although it denies the degree of the split in authority. Moreover, the parties' positions in this case lie precisely on the two sides where authority is split: whether a deprivation of due process, accomplished by a state agency responsible for providing it, will state a cause of action under § 1983.

The Brief in Opposition does not even comprehend the holding below. At page 11, the Respondents cite "procedural facts which authorized the trial court to make a determination, as a matter of law that Petitioner had not been deprived of a protected property interest without due process of law". In the first place, the Respondents simply fabricate the "facts" supporting this contention. In the second place, the holding of the courts below was just the opposite. The holding of the Georgia

Supreme Court below was that it would not allow a § 1983 suit to remedy a violation of due process, no matter how serious, because the state remedy was "adequate" to remedy it – *not* because no violation had occurred. It did not disturb the findings of the courts below that "the record clearly shows a procedural due process violation in this case." (Petition, A11.)

In the limited space below, Dowling briefly cite the most egregious fabrications of fact in the Brief in Opposition, and give a citation (and a quote, if appropriate) to the actual record.

1. The Respondents assert that "Petitioner was out of her office without pay only from . . . July 15, 1992 until . . . August 20, 1992." (Brief in Opposition, p. 8)

This assertion is incomprehensible. Dowling was fired effective July 1, 1992, and was not allowed in her office until January, 1994. (Petition, A7.) During this time, her salary was discontinued from July 15 to August 20, 1992, (Petition, A15; R1 176)[1]; from November 9, 1992 (Petition, A7; R1 293 (¶¶ 2 and 3)), until March 16, 1993

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[1] For reasons known only to themselves, the Respondents have adopted a confusingly different record citation form from that used in the Petition. Since the facts are in dispute, Petitioner will use the Respondents' system for purposes of this Reply. Citations to the first appeal, Ga. Supreme Court case No. S93A1330 (upholding the sanctions award against the School Board), will be designated "R1". Citations to the record of Ga. Supreme Court Case No. S95C1083 (the present appeal) will be designated "R".

(In the original Petition, citations to S93A1330 are designated "R I", and citations to S95C1083 are designated "R II".)

(R1 297; see Petition, A4); and from April 7, 1993, until January, 1994 (R 277). During the 18-month period, she was deprived of pay for periods of over one month, four months, and nine months.

2. At page 4 of their Brief, Respondents claim that they "fully complied with [the court's August 20] order. In fact, they transgressed this order so badly that they were fined for contempt of court. (R1 292.)

3. At page 9, the Respondents also assert that no "other alleged violations of due process were raised in Petitioner's complaint or preserved for review by this Court," than "pre-termination procedural due process." This is, again, simply incomprehensible.

In her complaint, Dowling specifically pleaded that "The Schools' suspension and dismissal of Dowling without providing . . . a timely post-termination hearing . . . violate 42 U.S.C.A. §§ 1983 and the fourteenth amendment . . . . " (R1 168, 181 (¶ 44)).

She raised and argued this issue at length in all appeals, including the instant Petition. (E.g., Brief of Appellant, Case A94A2185, p. 17; Brief of Respondent, S95C1083, page 9; Petition, p. i, (1) and (2) and *passim*.)

4. The Respondents claim that Dowling "received all the pre-termination process that was due". (Brief in Opposition, p. 12.) This is simply mind-boggling. They ignore the most basic premise of due process, that is, their duty to comply with the hearing's outcome. A hearing which establishes a lack of justification to discipline

an employee, which is then ignored by the state, is not "due process" at all.[2]

The fundamental principle of due process consists of the state's duty to provide, not simply a hearing, but a "meaningful" hearing. *E.g., Stewart v. Bailey*, 556 F.2d 281, 285 (CA5 1977) (a tenured employee "must be accorded a meaningful opportunity to be heard in his own defense"). To ignore the result of a hearing renders the concept of due process meaningless, a sham form preliminary to a preordained termination, which is exactly what happened here.

5. At page 8 of their Brief, the Respondents assert that

> Petitioner had a full hearing on October 4, 5, and 8, 1992 and has never challenged the adequacy – either under the Fair Dismissal Act or under the 14th amendment – of that hearing.

This statement is, again, simply incomprehensible. Dowling specifically complained that the notice of the charges against her was so inadequate as to violate the Fourteenth Amendment in her complaint (R1 168, 181), at her administrative hearings (see R 147-155), in her administrative appeal (R 188-198, ¶¶ 3, 4, 9, 11, 13), in her Proposed Pretrial Order (R 313, 320), to the Georgia Court of Appeals (Brief of Appellant, A94A2185, page 18), and the Georgia Supreme Court (Brief of Respondent, S93C1083, pages 23-24).

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[2] Respondents' argument recalls a scene from the movie "Hang 'em High", in which the sheriff stops a posse from lynching Clint Eastwood. "You can't hang him," says the sheriff, "he's got a right to a fair trial". "Fine", says one of the posse. "We'll give him a trial. *Then* we'll hang him."

6. At page 7, n. 13, the Respondents assert that "there is no support for Petitioner's assertion that the hearing was 'constitutionally inadequate.' "

There is not simply "support" for the proposition; it is arguably established as a final finding in this case. In reviewing the adequacy of the hearing under the Fair Dismissal Act, the State Board of Education held that:

> None of these charges[3] [i.e., the notice of charges served on Dowling] carries with it the specificity needed to permit Appellant to show any error that may exist therein. While Appellant was able to provide a defense . . . [d]efending against such charges is mere guesswork on Appellant's part.

(R 229.) The superior court affirmed this decision[4], and the Respondents took no further appeal. Thus, the State Board's findings are final and binding.[5]

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[3] Typical of the Respondents' bad faith, the Respondents repeatedly changed and supplemented the charges against Dowling. Most of these were invented and sent to her *after* her first termination, and after the initial hearing was scheduled. (R1 204, 208, 210, 212, 215, 220.) Please note that the charges held inadequate by the State Board were served on Dowling *after* the hearing officer continued the hearing, a second time, on September 17 for failure of adequate notification. In other words, these charges were the ones served by the School Board to *remedy* an initial finding of inadequate notice.

[4] *Atlanta Bd. of Ed. v. Dowling*, Civil Action No. E-16735.5 (Superior Court of Fulton County, January 15, 1994).

[5] While its decision was based on the Fair Dismissal Act, the test for adequacy of notice is identical under the Fair Dismissal Act and the Fourteenth Amendment. The language of the Act is, in fact, adopted from a Fourteenth Amendment case, *Stewart v. Bailey*, 556 F.2d 281, 285 (CA5 1977). Thus, while the

7. At page 15 of their Brief, the Respondents, attempting to distinguish *Zinermon v. Burch*, 494 U.S. 113 (1990), state that the "Georgia law at issue in this case require procedures which provide no discretion to the governmental agency . . . . " To confuse a failure by the State to provide an adequate due process statute, the Respondents blur the lines between Dowling's statutory rights to due process under Georgia law and her purely contractual rights, which the administrative process refused to enforce.

The only due process guarantee available to Dowling under Georgia statutes, O.C.G.A. § 20-2-1160, explicitly gives discretion to a local board of education to formulate procedures. The State Board decision illustrates the point. It held that the notice given to Dowling was inadequate to permit a defense under the Fair Dismissal Act (O.C.G.A. § 20-2-940), but that it was powerless to remedy the inadequacy, because the Act did not apply to Dowling. (R 229-30, 232.)

8. At page 4, Respondents assert that the lower court granted Dowling summary judgment "under the Fair Dismissal Act." The court, however, found that Dowling had no protection under the Fair Dismissal Act "as a matter of statutory construction" and cited a Fourteenth Amendment case as the grounds of summary judgment.

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holding is not res judicata, the Board's factual finding of inadequacy, upheld on appeal, collaterally estops the Board from asserting that the notice was adequate under the Fourteenth Amendment.

(Petition, A16.)[6] Dowling did not have any statutory rights under the Act.

9. The entire second paragraph of the Respondents' Statement of Facts (Brief in Opposition, pp. 1-2) is completely unsupported by record evidence; the point which the Respondents attempt to make, based on these "facts", is a gross falsehood. The paragraph's record citation is to a self-serving letter written by Respondents' counsel, who did not even attend this "hearing"; the second half of the paragraph contains no record citation at all, because none exists. In fact, the discussion at these meetings did not even begin to encompass the grounds upon which the School Board attempted to justify Dowling's termination.[7]

Dowling did not get a pre-termination hearing. There is sworn testimony in the record that Dowling received no "pre-termination hearing". (R1 59, 177 (¶24).) The Respondents even admitted that "the Atlanta Board of Education did not schedule a hearing with respect to the

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[6] The court did turn to the language of the Fair Dismissal Act to determine the procedures to afford. The reason for this is that Dowling's *contract* incorporated portions of the Act, but only by reference, that is, as a contractual provision. Her contract might as easily have referenced the procedures of the Tibetan Fair Dismissal Act. The point is, Georgia's statutes afforded her no specific rights at all.

[7] At page 10, the Respondents have the brass to call these fabricated facts "undisputed" by vague references to a "number of hearings", etc. As shown, the facts are at best disputed and must be construed in Dowling's favor. The reference to an unidentified "motion for summary judgment" hardly changes this presumption. *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974).

proposed non-renewal of Plaintiff's employment contract prior to June 16, 1992." (R 9, ¶20.)

At various points (e.g., Brief in Opposition, pp. 1-2, 7) the Respondents attempt to mislead the Court by characterizing these hearings as issues decided in their favor by the court below. While the superior court did mentioned both the 1991 "hearing" (R1 65) and the July 15, 1992 "hearing", it did so only in the context of finding that these hearings were inadequate to constitute a pre-termination hearing under the Fair Dismissal Act[8] (R1 65 (¶ g)). Its holding was contrary to the School District and meant to support its restraining order against them. This hardly constitutes evidence that these "hearings" were a "pre-termination" hearing adequate under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

B. The 11th Circuit Has Not Ruled on the Issue Here Presented.

The Brief of Respondents chides Dowling's Petition for its failure to "argue that the instant case can be distinguished in any way" from *McKinney v. Pate*, 20 F.3d 1550 (CA11 1994), or *McDaniels v. Flick*, 59 F.3d 446 (CA3 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1017 (1996). The holdings of *McKinney* and *McDaniels* can be summed up in a sentence:

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[8] This holding was made under Dowling's contract; as a matter of statutory law, the only rights Dowling enjoyed to due process under state law (O.C.G.A. § 20-2-1160) were so open-ended as to deny her constitutional protection. (R 229-30.)

> [A] discharged employee cannot claim in federal court that he has been denied due process . . . where he has not taken advantage of his right to a post-deprivation hearing . . . that can rectify any possible wrong committed by the initial decision maker.

59 F.3d at 460. The holding in *McKinney* was identical; the state actor voluntarily gave him a hearing and allowed for an appeal. 20 F.3d at 1555. Dowling's argument is just the opposite: she could not "take advantage of her right to a post-deprivation hearing". She *had* to go to court for constitutionally-adequate relief on three different occasions. Furthermore, the administrative process available to Dowling could not "rectify" procedural defects. The State Board specifically held as such. (R 229-232.)

The Respondents also argue, tacitly, that an employee who files suit in state court, and wins, has gotten relief from "the state". (Brief in Opposition, pp. 15-16.) A state, however, may be sued as a party in a "state court"; the two entities are not the same. In performing its judicial function – that is, by compelling a state actor to provide due process – a state court of general jurisdiction stands in the shoes of a federal court, not the shoes of the entity which fired her. If a state agency's abuse of delegated power requires an employee to file a lawsuit in order to get due process, the fact that she does so in state court does not mean that the "state" has provided due process. Such a holding would result in the states' courts applying

different substantive legal standards for interpreting the Fourteenth Amendment than the federal courts.[9]

CONCLUSION

Dowling prays the Court not to allow the Respondents' wholesale factual misrepresentations to deter it from accepting the Petition. The case presents clear examples of egregious due process abuse and constitutes an appropriate vehicle for this Court's consideration of an important and divisive issue of Constitutional law.

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[9] A state court may also act as an appeal forum for an administrative process; in this function, it does indeed differ from a federal court. The court below did eventually exercise this function, but only *after* it forced the Schools to give Dowling a hearing in the first place. The whole point of this Petition is that Dowling had to sue under § 1983, invoking the court's plenary jurisdiction, to get a "meaningful" hearing in the first place.